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No. ~~2399~~ 2733

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY C. CUTTING,

Appellant,

vs.

HENRY J. WOODWARD, FRANCIS A. WOODWARD and THE MONETARY TRUST COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEES, HENRY J. WOODWARD AND FRANCIS A. WOODWARD.

JOHN B. CLAYBERG,
WELLES WHITMORE,
CLAYBERG & WHITMORE,
Solicitors for Appellees, Henry J. Woodward and Francis A. Woodward.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Appellant in his "Statement of the Case" has so interwoven matters which have nothing to do with the questions involved on this appeal, with matters relevant to such questions, that, we have concluded to present to the Court a brief statement of the case.

Statement of the Case.

The action was brought for two purposes:

1. To obtain a decree of the Court setting aside and cancelling as fraudulent the pretended pur-

chase by appellant Cutting from the defendant Monetary Trust Company, of 2350 shares of the capital stock of the Point Richmond Canal and Land Company, and,

2. To obtain a decree of the Court compelling appellant Cutting to account for all moneys, and property of the Monetary Trust Company, which he had received and misappropriated, and directing said Cutting to pay to the Monetary Trust Company the amount found due.

If any questions at all can be considered by this Court on this appeal, they are such only as bear upon the validity of the decree appealed from in so far as that decree decided that the pretended purchase of the 1175 shares of stock on December 20, 1906, was fraudulent and void. The most of the testimony taken on the part of the plaintiffs at the trial of the case was for the purpose of making a prima facie case for a decree ordering an account. The accounting was ordered and the matter referred to a Master to take and state the account.

We shall contend when we come to the argument of the case, that the decree appealed from is interlocutory, and not appealable, and that this Court has no jurisdiction to consider or decide any questions raised by appellant.

The bill in so far as the same relates to the attempted sale sought to be set aside as void and fraudulent, alleges briefly as follows:

I.

The jurisdictional allegations of diversity of citizenship and the amount involved. It also alleges that the action is brought by plaintiffs for and in behalf of themselves and all other stockholders similarly situated who may desire to join in the action.

(Tr. p. 2, par. 1, bill.)

II.

That this suit is not collusive and alleges in compliance with the requirement of Equity Rule 27.

(Tr. pp. 2-3-4-5, par. 2, bill.)

III.

The ownership of certain shares of the capital stock of the Monetary Trust Company, and that the Monetary Trust Company is the owner of 1175 shares of stock of the Point Richmond Canal and Land Company.

(Tr. pp. 5-6, par. 3, bill.)

IV.

That the assumed records of the Monetary Trust Company of a directors' meeting of that company claimed to have been held on or about the 20th day of December, 1906, contains a statement that the following resolution was unanimously passed by the board of directors: "Mr. H. W. Wernse presented the check of H. C. Cutting for $1175, stating that Mr. Cutting desired to exercise his rights under the option given him by the Monetary Trust

Company, ratified and confirmed by the stockholders at their last meeting, to purchase 1175 shares of the Point Richmond Canal and Land Company held by the Monetary Trust Company at one dollar per share." That the assumed meeting was not a regular meeting of the board of directors; was not properly called in accordance with the by-laws of the company or the statutes of the State of California; that the record of this assumed meeting disclosed that there were present at said meeting only Henry C. Cutting (appellant herein) and directors W. J. Morgan and W. H. Wernse, and that directors Betz and Mayo were absent; that in accordance with the by-laws of said company three directors were required to be present to constitute a quorum for the transaction of any business; that said record disclosed that the above recited resolution was passed unanimously by the vote of all directors present, and that Henry C. Cutting participated in the vote passing the resolution and voted for the same; that under and by virtue of said resolution defendant Cutting claims that he became the bona fide owner and holder for a valuable consideration of the 1175 shares of the capital stock of the Point Richmond Canal and Land Company; that defendant Cutting's vote was necessary to the passage of said resolution; that said Cutting was not a qualified director and not entitled to vote thereon, and could not have counted for the purpose of making a quorum of said directors. That the check of said Cutting so presented to the board was never cashed by the Trust Company, but that the

Trust Company four months later loaned the same amount of money represented by the check to the defendant Cutting and took his note therefor, which note is still outstanding unpaid, and barred by the statute of limitations.

(Tr. pp. 7-8-9, par. 5, bill.)

The bill them alleges that the ratification of the stockholders recited in the record of the meeting of the directors of December 20, 1906, was false and that no regular stockholders' meeting had been held for a long time prior to December 20, 1906; that the entire transaction of the pretended purchase was fraudulent and for the purpose of defrauding the Monetary Trust Company and its stockholders out of the assets of the company.

(Tr. pp. 10-11, par. 5, bill.)

That all the acts and doings of Cutting were fraudulent and intended so to be and were done and committed for the express purpose of cheating and defrauding the Monetary Trust Company and its stockholders out of their rights in any value in the assets of the company; that Cutting purposely, intentionally and fraudulently concealed their fraudulent practices from plaintiffs and the other stockholders by keeping or causing to be kept insufficient or inaccurate books of account and corporate records of the affairs of the company; that such fraudulent acts were not discovered until the month of January, 1913, just before the suit was commenced.

(Tr. pp. 18-19-20, par. 9, bill.)

That Cutting was the president and a director of the Monetary Trust Company at all times mentioned in the bill, and was acting in a fiduciary capacity towards plaintiffs and all the stockholders with reference to the assets, property and business of the company, and that he violated such duties and misappropriated the assets of the company and converted them to his own use and benefit.

(Tr. pp. 20-2, par. 10, bill.)

The allegation of the ownership by the Monetary Trust Company of 1175 shares of the capital stock of the Point Richmond Canal and Land Company was admitted by the answer of the defendants Cutting and the Monetary Trust Company (Tr. p. 37). This being true, the allegations of the complaint setting forth the method whereby the Monetary Trust Company became the owner of this stock, becomes immaterial upon this appeal.

Many allegations of the complaint refer to acts of Cutting and allege facts sufficient to warrant the Court in ordering Cutting to account for the misappropriation of moneys, and have absolutely nothing to do with this appeal.

Argument.

I.

We contend that the entire decree appealed from is interlocutory in its nature, and not appealable.

Section 128 of the New Judicial Court provides that "the Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts."

Section 129 provides for a review by appeal from an interlocutory decree or order where an injunction shall be granted, continued, refused or dissolved, or an application to dissolve an injunction shall be refused or an interlocutory decree or order shall be made appointing a receiver or an interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction or appointing a receiver.

By Section 129, therefore, appeals are allowed from certain interlocutory orders, but only in cases where an injunction or receiver are involved. This section gives no authority for an appeal from any other interlocutory order, but all other appeals must be from a final decree.

The decree appealed from is interlocutory in its entirety. It is entitled "interlocutory decree". It does not determine all of the rights of the parties. It finds that the defendant, H. C. Cutting, is not the owner of the 1175 shares of stock of the Point Richmond Canal and Land Company, transferred to him on the 20th day of December, 1906, but it does not direct the return of said stock or make any order in the premises. It orders an accounting only, and contemplates further action by the Court when the report of the Master has been received. There are 1175 additional shares of stock of the

Point Richmond Canal and Land Company involved in the case, the ownership of which has not been determined, and which remains to be determined after the accounting has been taken. In short, there is nothing ordered in this "interlocutory decree" except that an accounting be had. There is no order or direction in the decree capable of being enforced by execution.

The decree appealed from possesses no elements of finality.

DECREE APPEALED FROM NOT FINAL.

> "If the reference to a Master is to take an accounting upon which a decree is to be determined, then it is not final."

Simkin's Federal Equity Suit (2nd ed.), p. 660 (citing many cases, among which are):

> California National Bank v. Stateler, 171 U. S. (447) 449;
>
> McGourky v. Toledo and Ohio Central Railway Company, 146 U. S. (536) 546-50;
>
> Craighead v. Wilson, 18 How. 201.

A decree to be final must be a complete decision of all matters in controversy.

The final or interlocutory character of a decree depends in some measure upon the peculiar facts and circumstances of each case in which it is rendered.

Many cases on the finality of a decree have been collated and reviewed in the case of McGourky v.

Toledo and Ohio Central Railway Company, *supra,* and in the case of the California National Bank v. Stateler, *supra.* And we call the attention of the Court to these two cases:

McGourky v. Toledo and Ohio Central Railway Company, 146 U. S. (536) 546-550;

California National Bank v. Stateler, 171 U. S. (447) 449.

Speaking on the subject of the finality of a decree in the sense that the same is appealable, the late Chief Justice Taney, in the case of Fagay v. Conrad, in which it was held that the decree was final in the sense that it was appealable, because there was a finding of the ownership of the properties and an order directing the execution of instruments of conveyance and transfers of the property, and a further order for an accounting on certain matters involved in the case condemns the practice of making a final decree before the final determination of all matters involved in the litigation. The Court uses the following language:

> "It would certainly have been proper and entirely consistent with chancery practice for the Circuit Court to have announced in an interlocutory order or decree the opinion it had formed as to the rights of the parties, and the decree it would finally pronounce upon the titles and conveyances in contest. But there could be no necessity for passing immediately a final decree annulling the conveyances and ordering the property to be delivered to the assignee of the bankrupt."

Fagay v. Conrad, 6 How. 201.

We submit that the decree appealed from in this case conforms to the suggestion made by Judge Taney.

The court gave it as its opinion that the transfer of the 1175 shares of stock by the Monetary Trust Company to the defendant H. C. Cutting, was fraudulent and void, and that the stock still remains the property of the Trust Company and makes no order in the premises, but leaves it to a final decree to be rendered when all matters involved in the litigation are determined.

Speaking on this same subject the Court, in Craighead v. Wilson, *supra,* gives a rule by which to determine whether a decree is final in that sense that it is appealable and uses the following language:

> "To authorize an appeal the decree must be final in all matters within the pleadings so that an affirmance of the decree will end the suit."

APPEAL SHOULD BE DISMISSED.

Upon an examination of the decree appealed from (Tr. pp. 63-65) and consideration of the cases above cited, we ask the Court to dismiss this appeal for want of jurisdiction.

The appeal is not from a final decree.

II.

PROOF OF DEMAND FOR ACTION BY THE COMPANY.

Appellant has devoted much effort in his brief to show that no demand was made before suit, that the Monetary Trust Company take action to recover the 1175 shares of stock and the money misappropriated by appellant, and we deem it best to reply to this point, notwithstanding the fact that we believe that the appeal must be dismissed.

The allegations of the bill bring us clearly within the requirements of Equity Rule 27. While the record may not show that sufficient evidence was introduced by plaintiffs to support these allegations, yet a perusal of the testimony will clearly disclose, that any effort to procure action by the board of directors would have been unavailing. It is always within the power of the Court to determine on the facts proved whether a demand would have been unavailing.

Dane v. Morgan, 219 Fed. 313.

No demand is necessary in cases where the same would clearly prove unavailing.

Doctor v. Harington, 196 U. S. 579;
Delaware & Hudson R. Co. v. Albany, etc., R. Co., 213 U. S. 535.

If the testimony introduced was of such a character that the Court below may have concluded that a demand for action by the board of directors would have been unavailing, this is sufficient, without proof of a request on the board of directors to act, al-

though such requests are alleged in the bill. The testimony may have been so developed in the trial of the case that counsel for plaintiffs felt satisfied that the proof was so strong that all request for action on the part of the board of directors would be unavailing; that no evidence was introduced to prove a demand.

The Court below must have been satisfied from the proof introduced, either that a proper demand had been made or that no demand was necessary because it would have been unavailing. This must be so because if the court had not been so satisfied, no decree for plaintiff would have been entered. This satisfaction is fully apparent from the assignment of errors of the appellant.

(IV-V-VI of brief, pp. 15-16.)

Immediately prior to the commencement of this suit the directors were Cutting (appellant) Wernse, Morgan, Betz and Mayo. Cutting was the assumed purchaser and Wernse and Morgan the two other directors who consummated the purchase. Wernse had been paid his salary by Cutting for many months prior to December 20, 1906, who charged the same to the Trust Company, although that company was not doing any business whatever. Wernse was evidently Cutting's right-hand man.

(Tr. pp. 106-143, Wernse's testimony.)

Betz never paid anything for his stock (Tr. p. 222). He always voted as Cutting desired (Tr. p. 224). Morgan did not consider $1 per share a reasonable price for the stock, but he was busy with

other matters, his interest was small, and he says "I just agreed to let it go (Tr. p. 226). Cutting had talked of an assessment and the company had no money (Tr. pp. 227-228). He did not think the proposition a good one, although he entered into it (Tr. p. 230). Morgan could not swear positively that he ever voted against anything that was brought up before the board (Tr. p. 230). Mayo was evidently not recognized by the board. He was living in Sacramento and whenever the board called a meeting they gave him notice. Such notice was generally received after the meetings were held (Record p. 146). If the notice was received in time and he came down to attend a meeting it was postponed (Record p. 143). He had nothing to do with the management of the Trust Company, and cut no figure in anything that was done. He was not allowed in any of the secret counsel of the company; whenever he came into the office where the other directors were together there would be a hush, and nothing was said. His presence always caused a silence (Record p. 176). It was thus apparent that the entire management of the company was controlled by Cutting, Wernse and Betz.

It seems too apparent for argument that the board of of directors, except Mayo, were all controlled by Cutting, and that any request for the board to take action upon this matter would have been unavailing.

When the Court below found the attempted purchase to be absolutely fraudulent and void; it would,

indeed, be a strange rule of equity that would require a stockholder to ask the parties who had been guilty of the fraud to bring a suit for the purpose of disclosing their own fraud, and compelling themselves to make restitution to the company.

Again, the fact that defendants H. C. Cutting and the Monetary Trust Company joined together, in a joint answer, to the bill in this cause, *alone* is sufficient proof that a demand on the board of directors of the Monetary Trust Company, for action by that company, would have been futile.

RATIFICATION.

Counsel for the appellant takes the position that the transaction involved in the sale of the 1175 shares of stock to Cutting, was only constructively fraudulent, was subject to ratification and was duly ratified.

Generally speaking any transaction of a corporation or its officers which is within corporate power, may be ratified, but there can never be a ratification of *ultra vires* acts, except as to third person, and then only when the consideration for the contract has been received and is retained by the corporation.

Any act not *ultra vires*, which has been irregularly performed by the officers of a corporation, is not necessarily void but merely voidable, and the irregularity may be waived or the act ratified.

The transaction here involved is, by the court below, held *void and fraudulent.* No rights of third parties intervene,—no consideration has been paid to or retained by the company; therefore no ratification or waiver can exist.

The only ratification by stockholders at a stockholders' meeting, to which attention is called by appellant, is the meeting of November 10, 1906, which only assumes to ratify an option theretofore given appellant Cutting by the executive committee of the company, to purchase the 1175 shares of stock at one dollar per share. This meeting cannot be made a basis for the ratification of anything. On its face it purports to be held "pursuant to adjournment" (Tr. p. 102).

The record of the company contains no minutes of any prior meeting of the stockholders which was adjourned to that date.

On September 3, 1906, a directors' meeting seems to have been held, in the minutes of which is recited a resolution stating that the annual meeting of the stockholders had not been held and announces a call for such meeting to be held on September 29, 1906. And the secretary is directed to make the necessary publication (Tr. p. 104).

Betz says this meeting did not take place (Tr. p. 105). There is no record of it, and as the Statutes of the State, and the by-laws of the company, require minutes to be kept of all stockholders' meetings, there can be no presumption that it was held.

The questions propounded to the witness Betz by the court below are very indicative (Tr. p. 105).

The records of the company contain no waiver of notice of the meeting and no consent to the holding thereof, as required by Section 317 of the Civil Code. The meeting was, therefore, of no force or effect whatever. But again Cutting's man Wernse was present at this meeting and evidently controlled the same. He represented 505 shares of stock personally and 753 shares as Cutting's proxy. The only other stockholder present was Betz, representing 55 shares, which he never paid anything for. It is so evident that it was a Cutting meeting that further comment seems unnecessary.

ESTOPPEL.

Counsel for appellant claims that the plaintiffs are estopped from now receiving the relief sought by their bill.

In the first place no estoppel is pleaded, none claimed in the answer and none asserted at the trial of the case. An estoppel cannot be first claimed in an appellate court. Besides this the record is absolutely barren of any evidence upon which an estoppel could be based.

LACHES.

Counsel for appellant claims that such laches on the part of plaintiffs is shown by the record, as to bar them from any remedy.

Laches can never be relied upon in case of actual fraud.

Michoud v. Girod, 4 How. U. S. 503.

In this case the Supreme Court said:

> "In cases of actual fraud courts of equity give relief after a long lapse of time, much longer than has passed since the executors in this instance purchased their testator's estate. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved length of time ought not to exclude relief. * * * There is no rule in equity which excludes consideration of circumstances, and in a case of actual fraud we believe no case can be found in the books in which a court of equity has refused to give relief within the life time of either of the parties upon whom the fraud is proved, and within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

See also

McIntire v. Prior, 173 U. S. 38;
Saxlehner v. Eisner Co., 179 U. S. 19;
Bryan v. Kales, 134 U. S. 126.

The above rule has been directly applied to transaction of directors of corporations, similar to those involved in this suit.

Malory v. Malory, Wheeler Co., 23 Atl. 709;
European, etc., Co. v. Poor, 59 Maine 281.

It is alleged in the bill that Cutting, since the time of the transaction relative to the purchase of the 1175 shares of stock, has been, and at the time of the

commencement of this suit, was the president and a director of the defendant Monetary Trust Company.

This created a fiduciary relation between Cutting and all the stockholders of the company, and brings this case directly within the authorities above cited.

MOTION FOR REHEARING.

Counsel for appellant also claims that the court erred in not granting the petition of the defendant for a rehearing. Such petition amounts to the same thing as a motion for a new trial in a suit at law. It has been the uniform practice of the United States Courts of Appeal, for many years, to hold that no appeal lies from an order denying a petition for rehearing in an equity case, or denying a motion for a new trial in a case at law. Such matters have always been held to be in the discretion of the trial court, and not reviewable on appeal. This rule is so uniform that citation of authorities would seem useless.

Counsel's entire argument is confusing and perplexing for the reason that he has interwoven the question of error in ordering the accounting with his argument upon other propositions, and it is difficult to separate the two.

ACTUAL FRAUD.

In the concluding argument of counsel it is claimed that the record discloses no actual fraud on

the part of Cutting, and in support of this argument he refers to the books of account of the Trust Company, introduced in evidence, showing that Cutting had paid into the company a large amount of money. Counsel evidently overlooked the fact that in the interlocutory decree it is ordered that Cutting render an account of the money actually paid upon his purchase of stock of the Monetary Trust Company. This accounting has not been had and the use of the books for the purpose above mentioned is not justified.

He also says "that men of large imagination who embark in enterprises, such as the development of the canal and harbor project of the Point Richmond Canal and Land Company, is shown to involve by instinct, are not the mean and petty cheats that plaintiffs charge Cutting with being." This argument might be of some force before a jury, but, when addressed to a court of last resort, deserves no consideration. Besides this, the accusation by plaintiffs against Cutting is that he has fraudulently procured assets of the Monetary Trust Company of the value of many hundred thousand dollars, and we can see no claim of "mean and petty cheats" involved.

When this court considers that H. C. Cutting had practically operated and controlled the entire affairs of the Monetary Trust Company for a long time prior to December 20, 1906, that he, through his friends and subordinates, attempted to purchase the only available assets of the company at a nominal

price, and that he never paid one dollar upon the purchase, but gave his check, which was subsequently exchanged for a note which has been outlawed for many years, we cannot understand how anyone can come before this Court and claim that his actions in that regard were "clean, open and above board."

Dated, San Francisco,
March 25, 1916.

Respectfully submitted,

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CLAYBERG & WHITMORE,
Solicitors for Appellees, Henry J. Woodward and Francis A. Woodward.